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No. 866

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

In the Matter of

LILLIAN CLAWANS, an Attorney,
(Charged with Contempt of Court),
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY AND APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

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LILLIAN CLAWANS, an Attorney,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY AND APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

Petitioner, Lillian Clawans, a practicing Counsellor-at-Law, with offices at 116 Market Street, City of Newark, State of New Jersey, respectfully prays that a Writ of Certiorari issue to review the decision and judgment, entered on the 15th day of January, 1962, in the Supreme Court of New Jersey denying her petition for certification to that Court of the decision of the Appellate Division of the Superior Court of the State of New Jersey affirming the summary action of the Assignment Judge of Essex County, New Jersey, in adjudging her guilty of two charges of contempt in the face of the Court, the two appeals therefrom having been consolidated for hearing by order of the Appellate Division, Superior Court of New Jersey, entered on April 15, 1961.

THE OPINION BELOW

No opinion was filed on the petition for certification by the Supreme Court of New Jersey. The opinion of the Appellate Division of the Superior Court of New Jersey is printed in the appendix hereto, infra; and is reported in 69 N. J. Super. Rep. at page 373, and 174 A. 2d 367.

The summary conviction of petitioner by Judge Alexander P. Waugh in the County Court of Essex County, New Jersey on two charges of criminal contempt occurred on December 5, 1960, and February 21, 1961, and resulted in the adjudication of fines of $100.00 for each offense. Separate appeals of right therefrom were prosecuted by petitioner to the Appellate Division, Superior Court of New Jersey, which were consolidated for hearing therein.

JURISDICTION

The decision and judgment of the Appellate Division of the Superior Court of New Jersey was entered October 2, 1961. A timely petition for rehearing was filed by petitioner, which was denied October 31, 1961. Petitioner then filed a timely Petition for Certification to the Supreme Court of New Jersey, which, as aforesaid, was denied by that Court on January 15, 1962.

The jurisdiction of this Honorable Court is invoked under the Act of June 5, 1928, 28 U. S. C. 1257.

STATEMENT OF THE CASE

This proceeding presents for correction errors of the Honorable Alexander P. Waugh, a Superior Court Judge acting as assignment judge in disposing of the integrated list of Superior Court and county court cases in Essex County, New Jersey, engaged in calling the calendar of pending cases, no jury being present and no trials in progress, in summarily adjudging petitioner guilty of

contempt without trial or an opportunity to be heard or to present evidence of extenuating, mitigating or justifying circumstances; errors of the Appellate Division of the Superior Court of New Jersey in affirming the judgment of the County Court, and errors of the Supreme Court of New Jersey in denying petitioner's petition for certification filed therein. The decision of the Appellate Division of the Superior Court of New Jersey is the "decision of the highest court of the State" sought to be reviewed herein. *Am. Ry. Express Co.* v. *Levee*, 263 U.S. 19, 21, 68 L.Ed. 140, 143; *Tucker* v. *Texas*, 326 U.S. 517, 90 L.Ed. 274; *Largent* v. *Texas*, 318 U.S. 418, 87 L.Ed. 873.

Petitioner has been engaged in the practice of law in New Jersey during the past 38 years.

In 1950 petitioner brought a proceeding in the Essex County District Court of New Jersey in which she sought to have Judge Waugh generally disqualified as a judge in all future litigation in which she appeared as an attorney (*Clawans* v. *Waugh*, 10 N.J. Super. 605). Such disqualification was denied by the Court. Since that time ill feeling and friction have continued between petitioner and Judge Waugh. In March, 1956, petitioner appeared before the Committee on the Judiciary of the New Jersey Senate and opposed Judge Waugh's reappointment. As a result, his reappointment was delayed for some time. This added fuel to an already smoldering fire of resentment on the part of Judge Waugh, with the result that for about thirteen years bitter feelings have existed between petitioner and Judge Waugh and he has lost no opportunity to demonstrate it.

In an affidavit executed by petitioner and annexed as Exhibit A to her petition for rehearing filed in the Appellate Division of the Superior Court of New Jersey (Tr. 5), petitioner has set forth in detail the facts in some sixteen cases and several other instances of alleged misconduct and prejudicial actions on the part of Judge

Waugh in dealing with cases involving petitioner as counsel and personally and relatives of petitioner. No denial, refutation, or explanation by Judge Waugh has been attempted or filed concerning the charges made against him by petitioner. In her affidavit, petitioner charged Judge Waugh with having instigated a criminal charge against her of subornation of perjury, which resulted in her indictment by the Grand Jury of Essex County while she was on a trip to Europe to visit her aunt who was seriously ill. Petitioner also alleges in her affidavit that on several occasions Judge Waugh gave to newspaper reporters false and misleading information concerning petitioner and her conduct. No denial thereof has been made by Judge Waugh.

Petitioner, by counsel, filed a motion for a change of venue for the trial of the charge of subornation of perjury to a county other than Essex County, which was denied by Judge Waugh on May 2, 1961. Petitioner also repeatedly sought permission to appear before the Grand Jury which returned the indictment against her before its discharge or expiration of its term, agreeing to waive immunity, but Judge Waugh denied those requests.

Petitioner's affidavit sets forth a course of conduct on the part of Judge Waugh of some thirteen years duration clearly demonstrating violent remarks on his part, criticism of petitioner's sister in open court in the presence of a number of other persons and a threat to hold her in contempt without any justification, and prejudicial conduct against petitioner and her clients, to such an extent that the judge and petitioner were embroiled in arguments and disagreements for years. Because of the judge's harassment of petitioner, she suffered a heart attack, lost thirty pounds in weight, and sustained serious impairment of her health, requiring prolonged medical treatment, and resulting in an admonition by her physician to refrain from entering Judge Waugh's court.

On numerous occasions, Judge Waugh has addressed petitioner in a manner calculated to irritate, upset, and disconcern her, and which in fact did result in that condition. In one case, Judge Waugh directed that petitioner be reported to the Committee on Ethics of the Essex County Bar Association by the client concerned because of her refusal to repay a fee of $250.00 to him following her request that he obtain a male attorney to represent him in the trial because of the nature of the offense charged. The Committee on Ethics held a hearing during January, 1961, and recommended that petitioner be paid an additional sum of $175.00 for her services to and on behalf of said defendant.

The long feud and friction between Judge Waugh and petitioner finally culminated in the two occasions mentioned above on which Judge Waugh imposed the fines of $100.00 each for contempt "in the face of the Court", which were paid by petitioner under protest. The appellate procedures recited above then followed.

Petitioner has exhausted all remedies provided by the laws, practice and procedure of the Courts of New Jersey and is without remedy other than by petition for writ of certiorari to this Honorable Court.

QUESTIONS PRESENTED

From the conduct of the judge who imposed the sentences upon petitioner, as disclosed by the record, the following questions are presented:

1. Whether the biased and prejudiced conduct of the trial judge, his treatment of petitioner, and his decisions in her cases over a period of some thirteen years precluded him from exercising against petitioner the summary power to hold her in contempt and sentence her, or whether justice required that she be afforded a trial on charges of contempt before

judge free from bias and prejudice and who could decide the matter dispassionately and fairly.

2. Whether the exercise of summary power to adjudge petitioner in contempt was appropriate and proper.

3. Whether petitioner was denied due process of law in violation of the Fourteenth Amendment to the Constitution by the trial judge because of his prejudice, his summary proceedings, and his denial to petitioner of the right to notice, charges, a hearing, including the right to offer evidence in contradiction or mitigation of such charges, and the right to be represented by counsel.

4. Whether the exercise of summary power to adjudge an attorney, acting as defense counsel during a calendar call, in contempt exceeds the bounds of fair judicial discretion, as applied to the long period of friction and arbitrary action on the part of the judge, where the record discloses the extreme hostility of the judge toward petitioner, her clients, her relatives and other counsel who appeared for her or her clients.

5. Whether the long period of persecution, biased conduct and prejudicial acts of the trial judge constituted such extreme provocation as to excuse or mitigate the remarks and conduct of the petitioner, which constitute the basis on which the judge assumed to exercise the arbitrary and summary power to adjudge an attorney of 38 years experience, in good standing at the bar, and against whom the judge had directed proceedings before the Bar Association Committee on Ethics; when he had initiated a proceeding before the Grand Jury to have petitioner indicted; had appointed the foreman of the Grand Jury which returned the indictment; had denied petitioner's requests

to appear before the Grand Jury, and had denied her a change of venue on the trial of the indictment.

6. Whether the procedure adopted by this prejudiced judge violated the Canons of Judicial Ethics of the American Bar Association made applicable to all Courts of the State of New Jersey.

7. Whether this Court should exercise its power to protect petitioner against a denial to her of due process of law by the continued, biased conduct and prejudicial practices of judge of a court wherein petitioner has an active practice from which she earns a livelihood, in accordance with the doctrine announced in *Sacher* v. *United States*, 343 U. S. 1, 9, 13, 96 L. Ed. 717, 72 S. Ct. 451.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution provides:

> "• • • nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 2A, Section 10-1 (Cited as Section 2A:10-1), of the New Jersey Statutes Annotated (Permanent Edition), provides that:

> "The power of any court of this state to punish for contempt shall not be construed to extend to any case except the:
>
> "a. Misbehavior of any person in the actual presence of the court;
>
> "b. Misbehavior of any officer of the court in his official transactions; and
>
> "c. Disobedience or resistance by any court officer, or by any party, juror, witness or any person what

soever to any lawful writ, process, judgment, order, or command of the court.

"Nothing contained in this section shall be deemed to affect the inherent jurisdiction of the superior court to punish for contempt."

By Section 2A:10-5 of the New Jersey Statutes Annotated, the maximum punishment for civil contempt is a fine of $50.00 and costs. Criminal contempts are punishable under the provisions of law relating to criminal misdemeanors.

Section 2A:10-7 of the same statutes empowers county courts to punish for contempt in any case provided by section 2A:10-1, supra.

SPECIFICATION OF ERRORS TO BE URGED

Petitioner respectfully presents the following specific errors as grounds for reversal of the courts below and for granting the writ prayed for herein:

1. The courts below erred in not granting petitioner a trial by jury on the two charges of criminal contempt or at least by an impartial judge, as guaranteed by the Constitution.

2. The courts below erred in determining that the conduct of petitioner on the two occasions involved constituted criminal contempt.

3. The Supreme Court of New Jersey erred in denying petitioner's petition for certification to that court for review of the decision of the Appellate Division of the Superior Court of New Jersey.

4. The Supreme Court of New Jersey erred in denying petitioner's petition for certification of her case to that court for review of all decisions below it.

5. The county assignment judge erred in exercising the power to punish petitioner for criminal con-

tempt under the circumstances involved in this case and this summary proceeding was a denial of due process of law.

REASONS FOR GRANTING THE WRIT

I

Several of the reasons usually advanced for the granting of a Writ of Certiorari are present in this case.

(a) The State courts below have rendered decisions in conflict with applicable decisions of this Court and the United States Circuit Courts of Appeal.

(b) The courts below have decided important questions of law contrary to earlier decisions of the courts of New Jersey.

(c) The courts below have permitted and sanctioned such departures from the accepted and usual course of judicial proceedings in the exercise of the summary power to punish for contempt by an inferior court that the exercise of this Court's supervisory powers is called for.

(d) The courts below have decided questions of general public interest and importance and of substance involving the construction and application of constitutional questions contrary to applicable decisions of this Court and the courts of New Jersey.

(e) The courts below denied petitioner due process of law when they decided that the conduct of petitioner could be considered apart from the conduct of the judge extending over a period of some thirteen years of prejudicial, biased, hostile and oppressive actions on his part directed against petitioner and her relatives, as well as her clients.

(f) The courts below have failed to take into consideration the long career of petitioner at the bar, her condition of physical and mental exhaustion caused by the judge's oppressive actions in procuring an indictment against her, and her extreme provocation.

(g) The courts below erred in deciding in effect that petitioner's actions constituted an obstruction of the administration of justice when no trials were in progress, no jury was present, and the judge merely was engaged in calling the calendar to ascertain what cases could be certified for trial.

II

The statutory provisions involved (Sec. 2A:10-1, supra) have little if any application to facts here involved. As to subdivision a of the statutory provision referred to, can petitioner's conduct be characterized as "misbehavior * * * in the actual presence of the court?" By the use of the word "misbehavior" the New Jersey legislature, in enacting the statute, must have meant conduct, deportment or manner of acting that affected in some way the due administration of justice. Petitioner's conduct caused no delays of the trials of any cases on the calendar. The cases called in which petitioner was counsel were assigned for trial and tried with no delays or untoward incident. There was no obstruction of the administration of justice, a necessary element of the offense of contempt of court. *Mariño* v. *Cocuzza* (Super. Ct. of N. J.), 81 A. 2d 181 (conviction reversed).

Subdivisions b and c of the statute cited above (Sec. 2A:10-1) clearly are not applicable.

In the case of *Swanson* v. *Swanson*, 10 N. J. Super. 513, 77 A. 2d 477, affirmed 84 A. 2d 450, the Court held that criminal contempts "are intrinsically offenses against or-

ganized society" and though they may occur in the course of private litigation they raise issues between the public and the accused. That being so, the issue between the public and the accused is one that properly should be decided by an impartial, unbiased judicial tribunal, and not by a prejudiced, vindictive judge whose animosity toward petitioner was so pronounced as to render him incapable of being judicially fair and impartial in any decision involving petitioner.

The New Jersey courts have held repeatedly that the essence of contempt is that it obstructs or tends to obstruct the administration of justice. *In re Carlisa*, 139 N. J. Eq. 404; 51 A. 2d 446; *Marigo* v. *Cacazza*, supra.

Proceedings against a person for contempt are in the nature of criminal trials. *McClure* v. *Gullick*, 17 N. J. L. 340; *Maginnis* v. *Parkhurst*, 4 N. J. Eq. 433.

"All contempts are criminal in their nature". *Orbea* v. *Wright*, 37 N. J. L. J. 50.

One accused of criminal contempt is entitled to the presumption of innocence, which remains throughout the trial as in any criminal prosecution. *Appeal of Verdon*, 91 N. J. L. 491, 104 A. 317.

The New Jersey courts also have said that the power to punish for criminal contempt should be used only in flagrant cases and with the utmost forbearance. *In re Bozorth*, 38 N. J. Super. 184, 118 A. 2d 430, decided less than two years ago.

In the instant case, it can not properly be said that the assignment judge exercised the power to punish for contempt "with the utmost forbearance", or any forbearance, for that matter. This case hardly can be termed a "flagrant" one, so the assignment judge was doubly wrong in adjudging petitioner to be a criminal and punishable as such.

Since the proceedings below involved an issue between the public and petitioner, the denial of her request to introduce evidence in explanation, mitigation or extenuation was arbitrary and capricious, and operated as a denial of due process of law. *Cooke* v. *United States*, 267 U.S. 511, 69 L.Ed. 767, followed in *Offutt* v. *United States*, 348 U.S. 11.

III

Affirming a judgment of conviction of contempt imposed by a biased, prejudiced and vindictive court is contrary to and violative of the universal solicitude of the public and the country as a whole that our judicial tribunals shall be free from interest, bias and prejudice that might or could disturb the normal course of impartial judgment. *Tumey* v. *Ohio*, 273 U.S. 510; 71 L.Ed. 749; *Offutt* v. *United States*, supra. *Berger* v. *U.S.*, 255 U.S. 22, 35, 36, 41 S. Ct. 230, 65 L. Ed. 481; *Whitaker* v. *McLean*, 73 App. D.C. 259, 118 F. 2d 596.

In the *Whitaker* case, the Court of Appeals said that "Hostility is a form of bias", and in the *Berger* case this Court said that courts of the United States "shall not only be impartial in controversies submitted to them but shall give assurance that they are impartial". See also *Tumey* v. *Ohio*, supra.

Permitting a summary adjudication of contempt by a known biased, prejudiced and vindictive judge to stand constitutes a flagrant denial of due process of law guaranteed by the Fourteenth Amendment to the Constitution. Clearly such a judgment ought to be set aside.

The assignment judge below had full opportunity to afford petitioner a fair hearing within the usual concepts of due process of law. Such procedure would not have impeded or obstructed the trial of any case, but would have given petitioner an opportunity to offer evidence of

explanation, mitigation, extenuation or excuse. The trial judge's hasty, ill advised and biased action prevented petitioner from having "her day in court" and denied to her due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution.

IV.

In the case of *Hovey* v. *Elliott*, 167 U. S. 409, 17 S. Ct. 841, 42 L. Ed. 215; this Court plainly said that a sentence pronounced without an opportunity of defense generally is not entitled to the respect of any tribunal, and would be a most flagrant violation of the rights of a citizen.

In petitioner's case, there was no need shown or asserted for the exercise of the summary power to punish for contempt, and such exercise of power was oppressive and an invasion of the right to counsel. Furthermore, the actions of the trial judge denied petitioner the right to notice, charges, a hearing, and the right to offer evidence in contradiction, mitigation, or excuse. Petitioner also was denied the right of counsel in meeting the charge of criminal contempt.

Measuring the conduct of petitioner in the light of the known biased, prejudiced and vindictive attitude and conduct of the trial judge for more than thirteen years, it falls far short of that serious and contemptuous attitude which called for summary punishment without an opportunity to defend or offer extenuating, explanatory or other evidence, or to cross-examine her accuser. Petitioner was denied the right to testify in her own behalf or to say anything by way of explanation. Without knowing any of the reasons why petitioner was not prepared at that precise moment to go on with the trial of her cases on the calendar, except that she had not seen one of her clients, the trial judge exercised a hasty, prejudicial, biased, ill advised decision to punish petitioner.

He did not exercise the power to punish for criminal contempt "with the utmost forbearance". *In re Bozorth*, supra. He was disqualified to impose sentence.

The language of the court in *Franklin* v. *Franklin*, 65 A. 2d 660, affirmed 65 A. 2d 665, 2 N. J. 103, that an adjudication of contempt may be based only on contumacious disregard of some writ, precept, order or command by a court of competent jurisdiction seems to be most appropriate and persuasive here.

V

This case bears a striking resemblance in principle to the case of *Offutt* v. *United States*, 348 U. S. 11, 75 S. Ct. 11, 99 L. Ed. 11, in which this Court reversed a sentence imposed by a trial judge of the United States District Court for the District of Columbia, which was modified by the United States Court of Appeals for the District of Columbia Circuit.

The following quotation from the Offut case is deemed appropriate here:

> "The proceeding grew out of the trial of one Peckham for abortion under D. C. Code, 1951, Secs. 22-201, 31 Stat. 1322. The petitioner was Peckham's trial counsel. Almost from the outset, a clash between the presiding judge and petitioner became manifest, which, it is fair to say, colored the course of the trial throughout its 14 days, and with increasing personal overtones. The judge again and again admonished petitioner for what he deemed disregard of rulings and other behavior outside the allowable limits of aggressive advocacy, and warned him of the consequences by way of punishment for contempt which such conduct invited. On the other hand, these interchanges between court and counsel were marked by expressions and revealed an attitude which hardly reflected the restraints of conventional judicial demeanor. * * *" (Page 15, L. Ed.)

Speaking of the authority of a judge to punish for contempt, this Court, in the same case, said:

> "* * * The power thus entrusted to a judge is wholly unrelated to his personal sensibilities, be they tender or rugged. But judges also are human, and may, in a human way, quite unwittingly identify offense to self with obstruction of law. Accordingly, this Court has deemed it important that district judges guard against this easy confusion by not sitting themselves in judgment upon misconduct of counsel where the contempt charged is entangled with the judge's personal feeling against the lawyer." (Page 16, L. Ed.)

Petitioner recognizes the fact that this case differs from the *Offutt* case in that here the action of the assignment judge was that of a State official, while the trial court in the *Offutt* case was a Federal Judge. There properly seems to be no basis, however, for a sound differentiation of the principles of due process involved in the two cases. Treating the *Offutt* case as an applicable judicial precedent that should be followed, petitioner respectfully submits that her petition for writ of certiorari should be granted.

VI

Inherent in the illegal, arbitrary and summary proceedings against petitioner is the further danger of disciplinary punishment by way of disbarment or suspension from the practice of law. After thirty-eight years of honorable conduct as a member of the legal profession, petitioner faces the threat, if the judgment of contempt is allowed to stand, of loss of her right to earn a livelihood as an attorney and counsellor at law. All that she has so meticulously guarded, and so carefully, painstakingly and industriously built in the way of a reputation and high standing at the bar may be destroyed by the few brief moments of indiscretion on petitioner's part and hasty action on the part of a vindictive and admittedly prejudiced judge.

The arbitrary exercise of the power to punish for contempt can destroy effectively the office of attorney and counsellor at law of any one and deprive petitioner and others of that fair and impartial trial guaranteed by the Fourteenth Amendment to the Constitution, in the event the adjudication against petitioner is not set aside.

CONCLUSION

Petitioner respectfully contends that the conduct of the trial judge in her case was such as to require a ruling thereon by this Court. If the judgment is permitted to remain un-reversed, a serious blow will have been struck at a fundamental right; namely, the right of every accused to a fair and impartial trial by an unbiased tribunal, a right guaranteed by the Fourteenth Amendment to the Constitution.

WHEREFORE, petitioner prays that this Honorable Court grant a Writ of Certiorari and bring before this Court the decision and judgment referred to herein.

Respectfully submitted.

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APPENDIX

Certification and Order for Sentence

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—ESSEX COUNTY

Docket No. M-475 A-38-60

STATE OF NEW JERSEY,

Plaintiff,

vs.

NORMAN BELL,

Defendant.

IN THE MATTER OF LILLIAN CLAWANS CHARGED WITH CRIMINAL CONTEMPT

On this 7th day of December, 1960, and pursuant to R.R. 3:8-1 and R.R. 4:87-1, it is hereby certified by me, the undersigned Judge of this Court, that:

1. On December 5, 1960, during a session of the Superior Court of New Jersey, Law Division, Essex County, held at the Court House in the City of Newark, Essex County, and State of New Jersey, and while the court was regularly engaged in the call of the civil and criminal appeal list, one Lillian Clawans, an Attorney-at-Law of the State of New Jersey, in the actual presence of the court and with the intent to contemn the authority and dignity of the court and obstruct the due administraion of justice, did contemaneously conduct herself toward the court in the manner and form as the facts are recited in the paragraph following.

2. When the case of State v. Bell was called, Miss Clawans repeatedly refused to converse with the court as to the status of her case and after several requests by

me directed to Miss Clawans, she embarked on a tirade of abuse impugning my integrity as a Judge in the most rude and discourteous manner. The detailed facts constituting this contemnaceous conduct are more particularly set forth in the attached transcript, which is made a part hereof.

3. The aforesaid conduct constituting this contempt was observed and heard by numerous members of the Bar who were present to answer the call, court attendants, and the lay spectators. Most of these persons cannot now be determined save the following: Brendan Byrne, Prosecutor of Essex County; Edward R. McGlynn, Esq.; Lloyd Beatty, Magistrate of Glen Ridge Borough, Essex County; Bernard Powell, Esq. This contempt was seen and heard by me as Judge of the Court, and was committed in the actual presence of the Court.

IT IS ADJUDGED that the defendant is guilty and has been summarily convicted of the offense of criminal contempt as hereinabove certified and it is ORDERED that she present herself before this Court for sentence on December 12, 1960 at 10:00 a.m. at the Essex County Court House, Newark, New Jersey, at which time she will be given an opportunity to be heard in mitigation or explanation of her conduct.

A copy of this certification and order, together with a copy of the transcript which forms a part hereof as set forth above, are ORDERED served upon the defendant, Lillian C. Evans, personally, within two days of the date of the making of this order and certification.

ALEXANDER P. WAUGH

A. J. S. C.

SUPERIOR COURT OF NEW JERSEY

Opinion of Appellate Division

Argued September 25, 1961—Decided October 2, 1961.

Before JUDGES GOLDMANN, FOLEY and LEWIS.

MR. RAYMOND F. BRADY argued the cause for appellant (MISS LILLIAN CLAWANS, attorney *pro se*; MR. BRADY, on the brief).

MR. SANFORD M. JAFFE, Special Legal Assistant prosecutor, argued the cause for respondent State of New Jersey (MR. BRENDAN T. BYRNE, Essex County Prosecutor, attorney; on the brief).

The opinion of the court was delivered by GOLDMANN, *S.J.A.D.*

Lillian Clawans, an attorney of this State, filed appeals from two judgments of contempt committed in the face of the court (Assignment Judge Waugh of Essex County). We consolidated the appeals for briefing and argument.

The first contempt occurred December 5, 1960. Judge Waugh called the civil and criminal appeal list at 9:30 A.M. Miss Clawans was defense attorney in *State* v. *Bell*, and when the case was called the State announced it was ready. The assignment clerk informed the court that Miss Clawans had telephoned that she would be 15 or 20 minutes late. Judge Waugh then said, "All right, mark it 'ready.'" The following occurred shortly after 10 A.M.:

> "The Court: Miss Clawans, you have an appeal.
> Miss Clawans: I am looking for my client.
> The Court: Will you please come back?
> Miss Clawans: I will have something to say to you when I come back.

The Court: Will you please come back, Miss Clawans?

Miss Clawans: No, I will not.

The Court: Miss Clawans, you will please come back.

Miss Clawans: I will not. I am looking for my client. I have had enough from you. You are a conspirator. I went before the Senate Judicial Committee on a complaint I made against you that you weren't qualified for a judicial position, and they held up your appointment. Then you conspired when I was in Europe on an emergency flight to see my sick aunt, you conspired against me, and you know it is not a lie. I have been trying, since I have been indicted by the Grand Jury, to appeal before the Grand Jury, and I am reliably informed, and I want the world to know, that you said I can't appear before the Grand Jury until I make an application before you.

I am not going to take this stuff any more. I have suffered from you for thirteen years. This is not a new thing. It is going on for thirteen years.

The Court: Miss Clawans, are you ready on your appeal?

Miss Clawans: I have to look for my client.

The Court: Miss Clawans, are you ready on the appeal?

Miss Clawans: I don't know until I look for my client.

The Court: Miss Clawans, I am going to hold you in contempt of court for your language before me."

The certification and order for sentence filed by Judge Waugh (see R. R. 3:8-1 and 4:87-1), recites that this conduct was observed and heard by numerous members of the bar who were present to answer the call, as well as by court attendants and spectators. Miss Clawans was summarily convicted of criminal contempt and, after repeated adjournments, fined $100, which she paid under protest.

The second contempt occurred February 21, 1961. Miss Clawans had pending in the Essex County Court three appeals from municipal court convictions, in *State* v. *Frazier*, *East Orange* v. *Frazier* and *State* v. *Garfinkel*. At the daily call held just before 10 A. M., the prosecuting attorney informed the court that the State had had its witnesses in court on a number of occasions but that they had not been brought in that morning because the prosecutor's office had been unable to get word as to whether the defense was ready. Garfinkel, one of the defendant-appellants, then informed the court that Miss Clawans was representing him and Frazier, that she had been called away on urgent business and that she requested the cases be marked ready for 2 P. M. The cases were so marked.

February 21 was also the adjourned date for sentencing Miss Clawans for the December 5 contempt. Judge Waugh noted on the record that he had received a telephone call from her attorney, who said she could not appear because of illness and that he would send the judge a doctor's certificate. Such a certificate had arrived stating that Miss Clawans was under the doctor's care for shock and nervousness since November 21, 1960; her physical condition had been aggravated on December 5, 1960, and so far no improvement had been noted. The judge further said he had been informed of Miss Clawans' appearance before the Domestic Relations Court the preceding day, and that she would appear there again that day. He said he had telephoned her attorney and told him he was not satisfied with the doctor's certificate, and that if Miss Clawans was well enough to try cases, she was well enough to be in court on the contempt matter. The judge continued the contempt proceedings to February 23. The prosecutor then advised the court that Miss Clawans had been to the prosecutor's office the day before at 4 P.M.

At 2 P.M. the prosecuting attorney informed the court that Miss Clawans had appeared in the prosecutor's office at about 1:50 P.M. and been told her cases were set down for 2 o'clock. She said she had an emergent matter to take care of and would be back at 2:15. Miss Clawans not having appeared by 2:30 P.M., Judge Waugh telephoned the Domestic Relations Court and found she was there. He was informed she would be sent over to the County Court as soon as possible. The following occurred at 2:55 P.M.:

"The Court: Call Miss Clawans in, please.

Court Officer Ernest Zoppi: She won't come in.

The Court: Let the record show that at quarter to three I received a call from Judge Lindeman's court stating that they had given Miss Clawans a message that I was awaiting her, and that she was on her way over. Call the two defendants in. Mr. Buckley, did you ask Miss Clawans if she will come in?

Mr. Vincent Buckley: I will now. One of the officers did.

(Miss Clawans enters the court room.)

The Court: Sit up at counsel table, please.

Miss Clawans: What is that?

The Court: Please come up to the counsel table. These two appeals were ready at ten o'clock this morning. I received word from one of the two gentlemen, the one on the left, is that Mr. Garfinkel?

Mr. Garfinkel: That's right.

The Court: That you said you had an emergent matter and you would be here at two o'clock. May I ask what the emergent matter was?

Miss Clawans: No. I refuse to tell you.

The Court: And at two o'clock we called the case and were told then by the Prosecutor you stopped down there at ten minutes to two and said you had an emergent matter but would be back at quarter past two. I found out that you were over at Judge

Lindeman's. I called and you were there. Are those cases ready?

Miss Clawans: The only one that would be ready would be the Garfinkel case. The other case I am not ready on.

The Court: Why not?

Miss Clawans: I am just not ready. That's all.

The Court: All right.

Miss Clawans: I have been sick, and these people have been trying to get me, and I haven't been able to physically handle it for them, but I am ready on the Garfinkel case. And I am sick at this moment too."

After adjourning Frazier's appeals to March 6, 1961 so that he might obtain another attorney, and assigning the Garfinkel case for immediate trial, Judge Waugh held Miss Clawans in contempt in the face of the court and fined her $100 "for your refusal to appear on time this morning, and because you will not tell me when I asked why you weren't here this morning." The certification and order for sentence filed by Judge Waugh the same day recites the further reason that when Miss Clawans advised she was ready to proceed with only one of her cases and was asked why she was not prepared as to the others, she declined to give any reason therefor and retorted, "I am just not ready. That's all." The fine was paid under protest.

The power of a court to punish summarily for contempt committed in the actual presence of the court has long been recognized. R. R. 3:8-1 and 4:87-1, similar to Rule 42(a) of the *Federal Rules of Criminal Procedure*, substantially restated the existing procedure:

> "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of

contempt shall recite the facts and shall be signed by the judge and entered of record."

See also, N. J. S. 2A:10-1.

Summary convictions for contempt are reviewable on appeal both upon the law and the facts, the appellate court being directed to give such judgment "as it shall deem to be lawful and just under all the circumstances of the case and shall enforce the same as it shall order." R. R. 1:5-2, 2:5; see also N. J. S. 2A:10-3.

The power summarily to punish contempts committed in the face of the court, "although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions." *Ex parte Terry*, 128 U. S. 239, 313, 9 S. Ct. 77, 32 L. Ed. 405 (1888). To deny courts this "right of self-preservation" (*Marshall v. Gordon*, 243 U. S. 521, 544, 37 S. Ct. 448, 61 L. Ed. 881 (1917)) would, as was said in *Board of Health Weehawken Tp. v. N. Y. Central R.R. Co.*, 10 N. J. 284, 290 (1952), "largely nullify their status and ability to function properly as an essential part of our judicial structure."

Appellant does not dispute this inherent power to punish summarily for contempt in the face of the court, but claims that (1) she was deprived of due process under the United States Constitution and the Constitution and laws of the State of New Jersey; and (2) Judge Waugh violated the *Canons of Judicial Ethics*, particularly *Canons* 3, 4, 11, 15 and 29, when he summarily adjudged her in contempt. Her arguments reduce themselves to a single contention: she was entitled to be judged by an impartial tribunal, and Judge Waugh was not and could not be impartial because of ill feeling which existed between them. In support of this claim, she recites the following, which she says may be "gleaned" from the record.

1. Her belief that she had been unfairly discriminated against by Judge Waugh over a 13-year period.

2. Her belief that she had unfairly been prevented from appearing and testifying before the grand jury in connection with a pending indictment against her.

3. Her belief that she had been subjected to a form of conspiracy.

4. Her belief that she was unfairly forced into trials.

5. Her proceedings against Judge Waugh in 1950 when she sought his general disqualification as a judge in all future cases in which she appeared as attorney. The reference here is to *Clancy v. Waugh*, 10 N.J. Super. 605, an Essex County District Court case heard by a special tribunal which dismissed the challenge.

6. Her appearance before the Senate Judiciary Committee in March 1956 to oppose Judge Waugh's reappointment.

Appellant argues that under the existing circumstances the proper procedure would have been to certify the matter to another judge for a full hearing under proper safeguards. Failure to do so was prejudicial.

Appellant places heavy reliance on *Offutt v. United States*, 348 U.S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1954). The case is not apposite. There judge and counsel engaged in continuous wrangling, marked by personal attacks and bitterness on both sides. The judge committed the attorney for criminal contempt in the face of the court. The Supreme Court reversed and remanded for a hearing before another judge. But see *Sacher v. United States*, 343 U.S. 1, 72 S. Ct. 451, 96 L. Ed. 717 (1952), rehearing

denied 343 U. S. 931, 72 S. Ct. 756, 96 L. Ed. 1341 (1952), referred to in *Offutt*, and Annotation, 64 *A. L. R.* 2d 600, 614-623 (1959).

The record does not bear out appellant's contention that counsel and the judge were personally embroiled with each other. None of the half-dozen reasons cited as indicating Judge Waugh's ill feeling toward Miss Lawans is supported by fact. At best, they indicate a unilateral ill feeling on *her* part toward the judge. Four of them reflect no more than her beliefs.

Other cases cited by appellant for the proposition that she was entitled to be tried before an impartial tribunal, have no pertinent application in the circumstances here under consideration. They dealt with criminal contempt not in the face of the court. Such cases are covered by R. R. 3:8-2 and 4:87-2. See *Oscar Barnett Foundry Co.* v. *Crowe*, 80 N. J. Eq. 109 (Ch. 1909), affirmed o. b. 80 N. J. Eq. 258 (E. & A. 1912); *In re Verdow*, 91 N. J. L. 494 (Sup. Ct. 1918); *Larkin* v. *Local No. 560, etc.*, 103 N. J. Eq. 195 (Ch. 1928); *Van Swearingen* v. *Van Swearingen*, 22 N. J. 440 (1956), reversing 34 N. J. Super. 394 (App. Div. 1955). See also, *State* v. *Maraski*, 6 N. J. Super. 36 (App. Div. 1949); *Swanson* v. *Swanson*, 10 N. J. Super. 513 (App. Div. 1950); *State* v. *Deutsch*, 34 N. J. 190 (1961), cited by appellant. The court's reasoning in those cases cannot be applied in the present instance since the situation before us is *sui generis*: the case is tried summarily by the judge in whose presence the offense was committed, and this is in strict conformity with our requirements of due process.

The proceedings of December 5, 1960 demonstrate the remarkable patience and restraint shown by Judge Waugh. Considering the charges leveled at him by appellant at the

time, and the fact that numerous persons were within hearing, there was no path open to him except to exercise his summary power. The office, if not the man himself, deserved more respect than was shown by Miss Clawans' intemperate comments.

The February 1961 offense also constituted a direct contempt. Miss Clawans' failure to appear at 10 A. M. to answer the call, or at the adjourned hour of 2 P. M., and her flat refusal to give the court any explanation for her tardiness or for not being ready to proceed with the Frazier cases, constituted contempt in the face of the court. *See* 59 *A. L. R.* 1272 (1929). In *State v. Zarata*, 35 N. J. Super. 177, 180 (1955), we pointed out that our cases have uniformly held that any act or conduct which obstructs or tends to obstruct the course of justice, constitutes a contempt. *In re Carnba*, 139 N. J. Eq. 404 (Ch. 1947), affirmed 140 N. J. Eq. 563 (E. & A. 1947); *certiorari* denied 335 U. S. 846, 69 S. Ct. 69, 93 L. Ed. 396 (1948); and see N. J. S. 2A:10-1(a) and (c).

Appellant pursued a course of contumacious conduct which invited the summary treatment finally visited upon her. We find no denial of due process nor any trespass upon the *Canons of Judicial Ethics*.

Affirmed.

On Petition for Rehearing Order Denying Petition

(Filed October 31, 1961.)

It is on the 31st day of October, 1961,

ORDERED that the petition for a rehearing of the above matter is denied.

For the Court:

SIDNEY GOLDMANN,
S. J. A. D.

SUPREME COURT OF NEW JERSEY

On Petition for Certification Order Denying Petition

IN THE MATTER OF LILLIAN CLAWANS

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 15th day of January 1962.

JOHN H. GILDEA
Clerk

FILED
Jan 15 1962
JOHN H. GILDEA
Clerk